

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

CIVIL NO. 1:07CV231

C. BURGESS,

Plaintiff,

Vs.

ORDER

**EFORCE MEDIA, INC.; IWIZARD
HOLDING, INC.; ADKNOWLEDGE,
INC.; BASEBALL EXPRESS, INC.;
ALLEN-EDMONDS SHOE
CORPORATION; INTERSEARCH
GROUP, INC.; TRUSCO
MANUFACTURING COMPANY;
PRICEGRABBER.COM, INC.;
SHOPZILLA, INC.; DAZADI, INC.;
and SIX THREE ZERO ENTERPRISES,
LLC,**

Defendants.

THIS MATTER is before the Court on the Plaintiff's "dismissal without prejudice."

On May 22, 2007, the Plaintiff filed an action in state court against the Defendants alleging they violated the "Can-Spam Act of 2003" by sending e-mails and viruses into his computer. On June 25, 2007, the

Defendants filed a notice of removal to this Court based on federal question jurisdiction.¹ On July 2, 2007, Defendant Pricegrabber.com, Inc., filed answer to the complaint. Other Defendants were given an extension of time to file answers which are due July 18, 2007. On July 6, 2007, the Plaintiff filed a purported notice of dismissal.

“[A]n action may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before service by the adverse party of an answer[.]” **Fed. R. Civ. P. 41(a)(1)**. Because Defendant Pricegrabber.com has filed an answer, the Plaintiff may not take a voluntary dismissal without prejudice of this action.

In addition, the answer of that Defendant contains an affirmative defense that the complaint fails to state a claim upon which relief may be granted. The Defendant may intend to file such a motion in which case any dismissal of the action would be with prejudice instead of without prejudice.

IT IS, THEREFORE, ORDERED that the notice of dismissal is hereby **STRICKEN** from the record.

¹Three of the Defendants did not join in the removal because they had not yet been served and, therefore, were not parties at the time of removal.

Signed: July 18, 2007

A handwritten signature in dark ink, appearing to read 'L. H. Thornburg', written over a horizontal line.

Lacy H. Thornburg
United States District Judge

